IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1214 OF 2004

Indian Airlines Ltd. ..Petitioner.

Vs.

R. V. Sawant & anr. ..Respondents.

....

Mr. S.M. Dixit with Mr. Sudeepdas Gupta and Ms. Rashmi Krishnan i/b Chhaya Shah for the Petitioner.
Mr. N.M. Ganguli for the Respondents.

....

CORAM: DR. D.Y. CHANDRACHUD, J.

27th September, 2006.

ORAL JUDGMENT :

1. Indian Airlines Limited is before the Court in a challenge under Article 226 of the Constitution to an order holding that the termination of the services of the First Respondent is null and void and that accordingly he shall be deemed to be in service from 3rd October, 1996 with consequential benefits.

2. The First Respondent joined the services of Indian Airlines Corporation which was then a statutory body governed by the provisions of the Air Corporations Act, 1953 on 14th February, 1979 as a Master Technician. The job of a Master Technician is to

maintain electrical equipment on board the aircraft of Indian Airlines and to check the equipment under the supervision and control of an Electrical Engineer. The workman was arrested on 9th September, 1996 together with an Engineering Helper by the name of C.S. Kadam upon being intercepted by the Air Intelligence Unit of the Customs Department in connection with the removal of contraband gold from an aircraft. Fifty five gold bars each of 10 tolas were alleged to have been recovered from aircraft which had operated on flight IC 591/A from Hyderabad to Sharjah and then to Mumbai and upon the Mumbai-Karachi-Mumbai sector the previous day. It was alleged that both the First Respondent and the co-worker admitted to have removed the contraband goods from the hat-rack above a seat on the aircraft.

3. A letter dated 11th September, 1996 was addressed to Indian Airlines Corporation by the Assistant Commissioner of Customs in the Air Intelligence Unit at Mumbai stating that these and other cases of concealment of contraband on board the aircraft have been reported in the press causing irreparable damage to Indian Airlines. The Board of Directors of the Corporation passed a resolution on 3rd October, 1996 considering the Memorandum

which was placed before the Board. The Memorandum recorded that the acts attributed to the First Respondent posed a threat to the security of the aircraft and passengers, since the removal of panels, and placing of items in certain portions of the aircraft would in all probability jeopardize the safety of the aircraft and the lives of the passengers. The Memorandum recorded that by the nature of the job such employees had access to the aircraft. It was alleged that the employees had misused the trust placed in them and rendered the functioning of the company vulnerable to misuse and external threats, consequent upon which there was a loss of confidence. The services of the First Respondent and of his co-worker were terminated in exercise of powers conferred by Regulation 13 of Indian Airlines' Service Regulations.

4. The First Respondent moved a complaint under Section 33-A of the Industrial Disputes Act, 1947 alleging that the employer had contravened the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947, in failing to move the National Industrial Tribunal, where a reference was pending for approval of the action taken by the employer against him. According to the First Respondent, the discharge was for an act of misconduct not

connected with the industrial dispute pending before the National Industrial Tribunal consequent upon which the provisions of Section 33(2)(b) were required to be complied with.

5. The employer filed his written statement before the Tribunal. No evidence was adduced on behalf of the workman. In its judgment and order dated 20th June, 2003 the Tribunal proceeded on the basis that Regulation 13 of Air India's Service Regulations would still continue to govern and on that assumption tested the case of the employer to the effect that a ground had been made out for the exercise of the power under the aforesaid regulation. The case of the workman, it must be noted, was that upon Indian Airlines Corporation ceasing to be a statutory body, and upon the enactment of the Air Corporations (Transfer of Undertaking and Repeal) Act, 1994 which came into force on 29th January, 1994, the regulations that were enacted under the provisions of the Air Corporations Act, 1953 would cease to operate. The Tribunal did not consider the question as to whether the regulations would survive particularly in relation to an employee such as the First Respondent, who was appointed in service prior to 29th January, 1994 when the Air Corporations Act, 1953 came to

be repealed. The Tribunal held that the allegation against the workman was that he was involved in a criminal act of misconduct for which a disciplinary enquiry could be held since the commission of a crime would also be a misconduct. The Tribunal was, however, of the view that :

> "It is difficult to understand merely because the contraband was gold smuggled how it posed a problem of security of Aircraft and passengers."

6. According to the Tribunal, the workman was arrested and was placed under suspension in which case it could not be held that he posed a threat to the safety of aircraft or the passengers. According to the Tribunal :

> "The employment of a person cannot be detrimental to the interests of the company merely because a person is charged with an enormous crime and he is reported to have made a confession during the course of investigation. In such cases, the company could have awaited the result of the criminal case or instituted a domestic enquiry. The workman was not even a member of the crew. His job was to check electrical equipment of the Aircraft. He was alleged to have removed gold bars from the hat rack of seat No.3113. The allegation was not that the workman has himself kept the gold. How the question of public safety could be involved if the workman removed gold which was already kept by an accomplice in the Aircraft."

7. The Tribunal was of the view that the order of termination of the services of the workman was malafide and that it was passed with a view to avoid the holding of a disciplinary enquiry or awaiting the result of a criminal trial. According to the Tribunal, the exercise of the power under Regulation 13 was in a case not amounting to misconduct under the Standing Orders. The Tribunal held that the acts attributed to the workman amounted to a misconduct; the termination, therefore, was not for an act not amounting to a misconduct and since the discharge was for an act of misconduct, Section 33(2)(b) of the Industrial Disputes Act, 1947 was attracted. The Tribunal held that since no approval application was filed before the National Industrial Tribunal where an industrial dispute was pending, the termination of services in the present case must be regarded as null and void entitling the workman to consequential benefits, as laid down in the judgment of the Supreme Court in **Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd. v. Ramagopal Sharma**[1].

8. On behalf of the Petitioner it has been submitted that (i) A complaint under Section 33-A of the Industrial Disputes Act,

1 2002 I CLR 789.

1947 has to be adjudicated upon as if it were a dispute referred to or pending before the Industrial Tribunal; (ii) The burden of establishing the invalidity of the order of termination lay on the workman and in the present case, absolutely no evidence was adduced on the part of the workman; (iii) The Board of Directors had legitimately exercised powers under Service Regulation 13 and the conditions precedent for the exercise of the power thereunder were established: (iv) The Board of Directors was justified in proceeding to issue the order of termination of discharge simpliciter notwithstanding the antecedent allegations in regard to the role of the employee in the present case and such a power that is conferred upon the employer has been held to be valid by the Supreme Court in **Ajit Kumar Nag v. General Manager (P.J.) v. Indian Oil Corporation Ltd. Haldia**[2]**;** (v) The view taken by the Tribunal to the effect that the acts attributed to the Respondent workman did not constitute a threat to the security of aircraft and of the passengers is ex facie perverse; and (vi) In so far as the applicability of the Regulations is concerned, in **Air India v. Union of India**[3], a distinction has been made by the Supreme Court in respect of those employees who were appointed in service prior to

2 JT 2005(8) SC 425.
3 (1995) 4 SCC 734.

the enforcement of the repealing act. A similar distinction was made by the Delhi High Court in an order dated 6th January, 1998 in C. W. P. 5677 of 1997 against which a petition for Special Leave to Appeal (S.L.P.(Civil) 448 of 1998) was dismissed on 20th February, 1998. Reliance was also placed on a judgment of a Learned Single Judge of the Calcutta High Court in **Indian Airlines Limited v. Sri Arup Kumar Bagchi** (Writ Petition 2514 of 2005) decided on 15th July, 2005.

9. On the other hand, Counsel appearing for the Respondent workman submitted that even though a complaint under Section 33-A has to be decided as if it were a reference to adjudication, the Tribunal was entitled to enquire into the material which was placed before it, even though no evidence was led on behalf of the workman. So construed, learned counsel submitted that the Tribunal was correct in its conclusion that the termination in the present case was a termination for an act of misconduct. In such an event, it was urged that the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 would have been attracted once the termination was regarded as termination for an act of misconduct.

10. Regulation 13 of the Service Regulations of Indian Airlines provides as follows :

> "Service Regulation 13
> a) The services of an employee may be terminated without assigning any reasons to him/her and without any prior notice but only on the following grounds not amounting to misconduct under the Standing Orders, namely :-
>
> i) If he/she is, in the opinion of the Corporation (the Board of Directors of Indian Airlines) incompetent and unsuitable for continued employment with the Corporation and such incompetence and unsuitability is such as to make his/her continuance in employment detrimental to the interests of the Corporation.
>
> OR
>
> If his/her continuation in employment constitutes, in the opinion of the Corporation (the Board of Directors of Indian Airlines), a grave security risk making his/her continuance in service detrimental to the interests of the Corporation.
>
> OR
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> If in the opinion of the Corporation (the Board of Directors of Indian Airlines) there is such a justifiable lack of confidence which having regard to the nature of duties performed, would make it necessary in the interest of the Corporation, to immediately terminate his/her services."

11. The service regulation in the present case contemplates

that the services of an employee may be terminated without reasons and without complying with the normal requirement of holding a disciplinary enquiry in certain specified eventualities. The basic premise which underlies Regulation 13 is that the termination is on grounds which do not constitute misconduct. Three different sets of eventualities are contemplated in Service Regulation 13 and the power to determine whether a case has been made out for the exercise of the right to terminate is vested in the Board of Directors of Indian Airlines. Now it needs no emphasis that the Board of Directors after Indian Airlines ceased to be a statutory corporation is vested with the power of management over the business and affairs of the company. The first set of circumstances in which the power can be exercised is where in the opinion of the Corporation an employee is incompetent and unsuitable for continued employment and such incompetence and unsuitability would render his continuance in employment detrimental to the interests of the Corporation. The second eventuality is where the continuation of an employee constitutes in the opinion of the Corporation a grave security risk rendering his or her continuance detrimental to the interests of the Corporation. The third and final eventuality is where in the opinion of the

Corporation there is a justifiable lack of confidence which, having regard to the nature of the duties performed, would make it necessary to immediately terminate the services of an employee.

12. The first and perhaps primary question that fell for consideration before the Tribunal was whether the service regulations that were formulated under the provisions of the Air Corporations Act, 1953 would survive in relation to their applicability to a workman who had joined service prior to the date on which the Air Corporations Act, 1953 came to be repealed. The Act was repealed on 29th January, 1994. Section 8 of the Air Corporations (Transfer of Undertakings & Repeal) Act, 1994 provided that every officer or other employee serving immediately before the appointed day in the Corporation shall, in so far as such employee is employed in connection with the undertaking which has vested in a company by virtue of the Act, become, as the case may be, an officer or employee of the company. Moreover, it has been provided that the officer or employee, as the case may be, shall hold his office or service “by the same tenure, at the same remuneration, upon the same terms and conditions, with the same obligations and with the same rights and privileges” as he would

have held if the undertaking of the Corporation had not vested in the company. In **Air India v. Union of India**[4], the Deputy Chief Labour Commissioner initiated proceedings against Air India under the provisions of the Industrial Employment (Standing Orders) Act, 1946 for certification of Standing Orders. Air India contended that the Standing Orders were not applicable to it but, that contention was rejected and the Standing Orders were certified. In proceedings initiated by Air India before the Delhi High Court it was held that the Standing Orders Act was a special enactment and that it applied to Air India's employees. The decision of the Delhi High Court in **Air India v. Union of India**[5] came up for consideration before the Supreme Court in the **Air India** case (supra). When the appeal came up for hearing, the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 had come into force. Based on this, it was urged that the Act having been repealed, the Regulations framed by Air India under Section 45 of the Air Corporations Act, 1953 no longer survive and Air India's attempt to avert a certification of the Standing Orders could not be countenanced. The Supreme Court held that if subordinate legislation is to survive the repeal of its parent statute, the

4 (1995) 4 SCC 734.
5 1991(62) FLR 441.

repealing statute must expressly so provide and Section 8 of the 1994 Act does not in express terms save the Regulations nor does it mention them. The Supreme Court held as follows :

> "Section 8 of the 1994 Act does not in express terms save the said Regulations, nor does it mention them. Section 8 only protects the remuneration, terms and conditions and rights and privileges of those who were in Air India's employment when the 1994 Act came into force. Such saving is undoubtedly "to quieten doubts" of those Air India employees who were then in service. What is enacted in Section 8 does not cover those employees who joined Air India's service after the 1994 Act came into force. The limited saving enacted in Section 8 does not, in our opinion, extend to the said Regulations."

The Supreme Court held that Air India therefore could not oppose the certification of the Standing Orders after 29th January, 1994 where the Regulations had ceased to be effective. The judgment of the Supreme Court in **Air India**'s case thus arose in a context where, Air India opposed the certification of the Standing Orders on the ground that it was governed by its own regulations made in pursuance of the provisions of Section 45. The Regulations having ceased to remain effective on 29th January, 1994, the Court held that the opposition to the certification of the Standing Orders did not survive. But significantly, the Supreme Court noted that the

saving in Section 8 was in order to quieten the doubts of those Air India employees who were then in service. In other words, the effect of Section 8 would be that an employee appointed prior to the date of the repeal would continue to hold his office upon the same terms and conditions, with the same obligations and with the same rights and privileges. In the present case, the Respondent workman joined service on 14th February, 1999 and the effect of Section 8 would be that he would be governed by the same terms and conditions and the same obligations that were attached to the office prior to the date of repeal. In these circumstances, it could not be said that the invocation of Regulation 13 by Indian Airlines in the case of an employee who had joined service prior to 29th January, 1994 was erroneous. A similar issue had arisen before the Delhi High Court in **Sanjeev Marwah v. Indian Airlines Ltd.** (CWP 5677 of 1997 decided on 6th January, 1998). Before the Division Bench of the Delhi High Court it was contended that the Regulation under which the disciplinary enquiry was being held did not survive in view of the repealing Act of 1994. The Delhi High Court noted that in paragraph 9 of the judgment in Air India, a distinction had been drawn between pre and post 1994 employees. The Delhi High Court held that the Petitioner being

admittedly a pre 1994 employee would be governed by the Service Regulations. A Special Leave Petition filed before the Supreme Court against the judgment was dismissed on 28th February, 1998. A dismissal of a Special Leave Petition in limine, it is settled, does not amount to upholding of the law propounded in the decision sought to be appealed against. (**U.P State Road Transport Corporation v. Omaditya Verma**[6] - at paragraph 7, pages 432, 433). The interpretation of the Delhi High Court is, in my respectful view, consistent with the law enunciated in the judgment of the Supreme Court in the **Air India** case (supra).

13. Regulation 13 of Indian Airlines came up for consideration before a Division Bench of this Court in **Prabha D. Kannan v. Indian Airlines Ltd.** (Writ Petition 2030 of 2003 decided on 30th August, 2005). A Division Bench of this Court was of the view that Regulation 13 is ultra vires Article 14 of the Constitution. The Learned Counsel for the Petitioner stated before the Court during submissions that the judgment of the Division Bench which was delivered on 30th August, 2005 is the subject matter of a pending Special Leave Petition before the Supreme Court in which

6 (2005) 4 SCC 424.

the judgment has been stayed. After the decision of the Division Bench in **Prabha Kannan**'s case the Supreme Court considered the vires of Standing Order 20(vi) applicable to Indian Oil Corporation in **Ajit Nag**'s case (supra). In **Nag**'s case the Standing Order in question was to the following effect :

> "Where a workman has been convicted for a criminal offence in a court of law or where the General Manager is satisfied for reasons to be recorded in writing, that it is neither expedient nor in the interest of security to continue the workman, the workman may be removed or dismissed from service without following the procedure laid down under III of this Clause."

The appellant before the Supreme Court was a senior officer in the office of Indian Oil Corporation Ltd. at its Haldia Refinery. On the basis of a complaint that the appellant led by a bunch of hooligans visited the hospital, assaulted the Chief Medical Officer and abused and threatened other officers, the General Manager of the Corporation dismissed the Appellant for an act of assault. No notice was issued nor was any disciplinary enquiry convened. The action was pursued under Standing Order 20(vi). The Supreme Court held, relying upon the earlier decision in **Dr. S.L. Agarwal v. General Manager, Hindustan Steel Limited**[7] that the Corporation was not a department of the Government since it had a distinct and

7 (1970) 3 SCR 363.

independent existence as a corporate body and the appellant was therefore not entitled to invoke Article 311 of the Constitution. The Supreme Court held that the subsequent decision in **Workmen of Hindustan Steel Limited v. Hindustan Steel Limited**[8] of two Learned Judges was per in curiam since the subsequent decision had proceeded to consider the provisions of a similar standing order on the anvil of Article 311 of the Constitution which could not be attracted to a corporate entity. The Supreme Court noted that the termination of the services of an employee on the basis of an analogous standing order had been upheld in **Hari Pada Khan v. Union of India**[9]**.** In **Ajit Nag**'s case it was urged before the Supreme Court that the power under Clause (vi) of the Standing Order 20 constitutes a serious inroad on the right of a workman and must be construed strictly. The Supreme Court did not accept the submission that the provision is arbitrary and ultra vires Article 14. The Court held that the General Manager of the Corporation is the highest administrative head of the Corporation and it could not be contended that the power had been conferred on a petty officer of the Corporation. The Supreme Court rejected the submission that Standing Order 20 conferred a blanket or uncanalised power

8 (1984) Supp SCC 554.
9 (1996) 1 SCC 536.

on the General Manager since sufficient guidelines and safeguards have been provided. These included :

(i) Conferment of the power on the highest administrative head of the Corporation;

(ii) Specification of the eventualities in which the power could be exercised;

(iii) Requirement of satisfaction that such an eventuality had arisen;

(iv) Recording of reasons in writing and

(v) Conferment of a right to appeal against the decision of the General Manager.

The Supreme Court held that Standing Order 20(vi) allowed the General Manager to take action in an emergency keeping in view an exceptional situation which had arisen when he was satisfied that the workman should be removed from service without following the normal procedure of a disciplinary enquiry. On the facts of the case, the Court held that detailed reasons had been indicated as to why the termination of the services of the employee under Standing Order 20(vi) had been effected. The General Manager, it was held, was satisfied that the acts of the appellant of threatening, intimidating and assaulting senior officers of the Refinery Hospital amounted to subversion and were prejudicial to the interest of the

Corporation. The General Manager had exercised the power keeping in mind the interest of maintaining discipline and morale among the employees of the Corporation and the staff of the Hospital. Any delay would seriously jeopardize the interest of the Corporation. The Supreme Court, it may be noted here, while holding that Standing Order 20(vi) was intra vires considered the judgments in **Central Inland Water Transport Corporation v. Brojo Nath Ganguly**[10] and **Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress**[11].

14. In so far as the present case is concerned, it would appear from the application filed by the Respondent workman that while the workman contested the applicability of Regulation 13 on the ground that the Regulations had ceased to remain in force after the repealing Act, there is no challenge to the validity of Regulation 13. In the circumstances, it would not be appropriate or proper for this Court to enquire into the constitutional validity of Regulation 13. There is no constitutional challenge before the Court and none has been urged in the submissions.

10 (1986) 3 SCC 156.
11 1991 Supp (1) SCC 600.

15. The Tribunal exercised jurisdiction on a complaint under Section 33A of the Industrial Disputes Act, 1947. Section 33A enables an employee, who is aggrieved by the contravention of the provisions of Section 33 by the employer, to make a complaint in writing inter alia to the Labour Court or Tribunal. The Court or Tribunal upon receipt of the complaint is required to adjudicate upon the complaint "as if it were a dispute referred to or pending before it" in accordance with the provisions of the Act and to submit an award to the appropriate government. No evidence was led before the Industrial Tribunal on the part of the workman and the Tribunal proceeded to deal with the complaint purely on the basis of the documents which were on the record. There is merit in the grievance of the Petitioner that the Industrial Tribunal has overlooked that the jurisdiction which it was exercising was conditioned by the requirement that the Tribunal shall adjudicate upon the complaint as if it were a dispute referred to it in accordance with the provisions of the Act. The case of the workman, assuming Regulation 13 applied, was that the employer was in fact, in the guise of discharging his services by an order of termination simpiciter actually punishing him for an act of misconduct. Such a case could not be adjudicated upon purely

upon the basis of an ipsi dixit and in the absence of evidence before the Tribunal which is a fact finding body. The reasons which have weighed with the Tribunal in holding that none of the conditions under Regulation 13 were made out are equally specious. The Tribunal holds that the security of the aircraft and of the passengers would not be affected merely because contraband gold was smuggled. This line of reasoning is with respect wholly erroneous. Nothing can be as destructive of the safety and security of the aircraft and of the safety of the passengers as wanton acts involving the smuggling of contraband articles. Persons who engage in such activities are not isolated elements. More often than not they form part of a chain of unlawful activities. The safety of the aircraft and the interests of the travelling passengers are grievously affected by such activities. The smuggling of any form of contraband impinges upon the integrity of the aircraft. The safety of a sanitised area is seriously compromised. The Tribunal was of the view that once the employee was placed under suspension, he would not be in a position to access the aircraft in which case it was not necessary to exercise the power under Regulation 13. This line of reasoning is entirely erroneous because the question that fell for

consideration before the Tribunal was whether having regard to the nature of the incident that had taken place, the conditions precedent for the exercise of the power under Regulation 13 had been established. The fact that the employee was temporarily disabled from performing regular duties by suspension from service cannot bar the Corporation from taking recourse to the provisions of Regulation 13. The Tribunal has proceeded to hold that the action of termination in the present case was malafide. An allegation of malafides has to be substantiated on the basis of clear and cogent evidence. In the present case, the workman did not adduce any evidence at all and therefore there was no question of malafides being established.

16. The Tribunal has in the concluding part of its judgment held that the termination of the services of the workman was in essence a termination for misconduct. Once the termination is held as a punishment for misconduct, the provisions of Section 33 (2)(b) were held to be attracted under which an approval application was required to be filed before the National Industrial Tribunal where a reference was pending at the material time. The question as to whether the power under Regulation 13 has been

appropriately exercised must precede the determination whether Section 33(2)(b) is attracted. If the termination is held not to be for an act of misconduct, but a discharge simpliciter otherwise than for misconduct, the provisions of Section 33(2)(b) would ex facie not be attracted. At the hearing of the present proceedings, Counsel appearing for the Respondent workman, however, submitted that in such an eventuality it would be appropriate if the proceedings are remitted back to the Tribunal for the purposes of enabling the workman to lead evidence on the basis of which the issue as to whether misconduct was the foundation of the action can be decided. In the interests of fairness, there is no reason why such a course of action should not be adopted. Fairly this has also not been opposed on behalf of the Petitioner.

17. In these circumstances, the impugned judgment and order of the Industrial Tribunal dated 20th June, 003 is quashed and set aside. The complaint filed by the Respondent workman shall stand restored to the National Industrial Tribunal. In the event that the Respondent workman makes an application before the Tribunal for leading evidence, the Tribunal shall dispose of such application after hearing the contentions of the parties. The Tribunal shall on

remand endeavour to dispose of the proceedings expeditiously. The Petition is accordingly disposed of. There shall be no order as to costs.